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UNITED STATES DISTRICT COURT

## NORTHERN DISTRICT CALIFORNIA

UNITED STATES OF AMERICA, ) Case No. C 07 06045 (SC)  
)  
Plaintiff, ) DEFENDANTS REGAL STONE LTD.  
) AND FLEET MANAGEMENT, LTD.'S  
) NOTICE OF MOTION AND MOTION  
) TO DISMISS, OR IN THE  
) ALTERNATIVE, STAY  
) PROCEEDINGS  
[FRCP 12(b)(1)]  
vs.  
M/V COSCO BUSAN, LR/IMO Ship. No. ) Date: April 25, 2008  
9231743 her engines, apparel, electronics, ) Time: 10:00 a.m.  
tackle, boats, appurtenances, etc., *in rem*, ) Dept.: 1  
THE SHIOPWNERS' INSURANCE & ) (The Honorable Samuel  
GUARANTY COMPANY LTD., REGAL )  
STONE, LIMITED, FLEET )  
MANAGEMENT LTD., and JOHN COTA, )  
*in personam*, )  
Defendants. )  
)

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1 Oil Spill Liability and Compensation: Hearing Before the Subcomm. On Water  
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1 **TO ALL PARTIES TO THIS ACTION AND THEIR ATTORNEY(S) OF RECORD:**

2 NOTICE IS HEREBY GIVEN that on April 25, 2008 at 10:00 a.m. in Courtroom 1  
 3 of the above-entitled Court, the Honorable Samuel Conti presiding, Defendants REGAL  
 4 STONE, LTD. and FLEET MANAGEMENT, LTD. ("Defendants") will move to dismiss,  
 5 or in the alternative to stay, proceedings pursuant to the Federal Rules of Civil  
 6 Procedure, Rule 12(b) 1, on all causes of action against Defendants contained in Plaintiff  
 7 UNITED STATES OF AMERICA's ("Plaintiff") Complaint on file herein.

8 This Motion will be based upon this Notice of Motion and Motion to Dismiss and  
 9 Stay Proceedings, the accompanying Memorandum of Points and Authorities, the  
 10 Declarations of Cynthia Hudson, K. Tim Perkins and Joseph A. Walsh II and all  
 11 Exhibits attached thereto, the complete files and records of this action, and such other  
 12 oral and documentary evidence as may be introduced at the hearing of this matter.

13 **I. INTRODUCTION**

14 Defendants REGAL STONE, LTD. and FLEET MANAGEMENT, LTD.  
 15 ("Defendants") move to dismiss the United States' claims for removal costs and damages,  
 16 on the grounds that the Court lacks subject matter jurisdiction. The Court lacks subject  
 17 matter jurisdiction because the United States has ignored the Oil Pollution Act's ("OPA")  
 18 mandatory claims presentation requirement. OPA requires the United States to submit  
 19 detailed invoices for its removal costs and damages, and to allow Defendants 90 days to  
 20 pay those invoices, before filing suit. Until the United States complies with these  
 21 provisions, the Court lacks jurisdiction to hear its claims for removal costs and damages.

22 Counts One and Five of the complaint seek recovery of the United States' removal  
 23 costs and damages under the National Marine Sanctuaries Act ("NMSA") and the Park  
 24 System Resource and Protection Act ("PSRPA"). However, the damages recoverable  
 25 under those statutes are identical to those recoverable under OPA. Trustee agencies of  
 26 the United States and the State of California have begun a multi-year, natural resource  
 27 damage assessment ("NRDA") process that includes an assessment of injuries to  
 28 resources within marine sanctuaries and parks resulting from the Cosco Busan incident.

1 They will be seeking compensation for any such injuries under OPA, once the NRDA  
 2 process is complete. Because the United States is seeking recovery for damages to  
 3 marine sanctuaries and national parks under the PSRPA, the NMSA, and OPA, OPA's  
 4 claims presentation requirement applies to these claims.

5 Defendants also move to dismiss the United States' claim seeking a declaration  
 6 that Defendants are liable for all removal costs and damages, because Defendants have  
 7 already acknowledged they are strictly liable to pay for removal costs and damages  
 8 resulting from the COSCO BUSAN incident. Given this situation, there is no case or  
 9 controversy for the court to address.

10 The United States has advised that it will ask the Court to rule on whether  
 11 Defendants are entitled to partial reimbursement of some of their OPA liabilities from  
 12 the Oil Spill Liability Trust Fund (OSLTF). OPA allows a ship owner to seek such  
 13 reimbursement from the OSLTF in some cases. If the Court ruled in Defendants favor  
 14 on this issue, it would obligate the OSLTF to pay Defendants tens of millions of dollars.  
 15 However, the issue is not within the Court's subject matter jurisdiction. OPA does not  
 16 waive the sovereign immunity of the United States, or confer jurisdiction on this Court  
 17 to rule on whether Defendants are eligible for partial reimbursement from the OSLTF.  
 18 Instead, OPA provides that such claims for reimbursement should be submitted to the  
 19 National Pollution Funds Center ("NPFC"), a division of the Coast Guard that  
 20 administers the OSLTF. The doctrines of sovereign immunity, exhaustion of  
 21 administrative remedies, and primary jurisdiction all require the court to dismiss any  
 22 claims relating to this issue.

23

24 **II. APPLICABLE LAW GOVERNING MOTIONS TO DISMISS FOR LACK OF  
 25 JURISDICTION.**

26 On a motion to dismiss for lack of jurisdiction, the plaintiff bears the burden of  
 27 establishing that jurisdiction exists. Rio Properties, Inc. v. Rio Int'l Interlink, 284 F.3d  
 28 1007, 1019 (9th Cir. 2002). Unless a plaintiff can prove otherwise, a federal court must

1 presume an action lies outside of its jurisdiction. See, Kokkonen v. Guardian Life Ins.  
 2 Co., 511 U.S. 375, 377 (1994); see also, Stock West, Inc. v. Confederated Tribes of the  
 3 Colville Reservation, 873 F.2d 1221, 1225 (9th Cir. 1989). “A plaintiff suing in federal  
 4 court must show in his pleading, affirmatively and distinctly, the existence of whatever  
 5 is essential to federal jurisdiction, and, if he does not do so, the court, on having the  
 6 defect called to its attention or on discovering the same, must dismiss the case, unless  
 7 the defect be corrected by amendment.” Smith v. McCullough, 270 U.S. 456, 459 (1926);  
 8 Tosco Corp. v. Communities for a Better Env’t, 236 F.3d 495, 499 (9th Cir. 2001).

9 A party moving to dismiss for lack of subject matter jurisdiction may submit  
 10 “affidavits or any other evidence properly before the court. \* \* \* It then becomes  
 11 necessary for the party opposing the motion to present affidavits or any other evidence  
 12 necessary to satisfy its burden of establishing that the court, in fact, possesses subject  
 13 matter jurisdiction.” Assoc. of Am. Med. Colleges v. United States, 217 F. 3d 770, 778  
 14 (9th Cir. 2000); Safe Air for Everyone v. Meyer, 373 F. 3d 1035, 1038 (9th Cir. 2004).

15

### 16 III. RELEVANT FACTS

17 On November 7, 2007, the COSCO BUSAN discharged approximately 53,000  
 18 gallons of bunker fuel into San Francisco Bay. (Declaration of K. Tim Perkins (“Perkins  
 19 Decl.”).) Defendants immediately took responsibility for the oil spill cleanup and  
 20 accepted liability for settling claims for damages resulting from the oil spill. (Id.) They  
 21 have paid in excess of \$40 million to date in clean up costs, and have cooperated and  
 22 participated within the Unified Command System to respond to the spill. (Id.) They  
 23 continue to pay the costs for the clean up of the oil and are now participating in a  
 24 cooperative assessment of damage to natural resources resulting from the spill. (Perkins  
 25 Decl.; Declaration of Cynthia Hudson (“Hudson Decl.”); Declaration of Gary Mauseth  
 26 (“Mauseth Decl.”).)

27 On November 8, 2007, the California Department of Fish and Game Office of Spill  
 28 Prevention and Response designated Regal Stone Limited as the Responsible Party

1 pursuant to California Government Code section 8670.51.1(a)(1). (Perkins Decl., Exhibit  
 2 A.) On November 9, 2007, the United States Coast Guard issued a similar designation  
 3 and notice pursuant to the OPA. (Id.) Both notices required the Responsible Party to  
 4 widely advertise the manner in which claims arising from the incident would be  
 5 accepted and paid. (Id.)

6 Defendants have not contested these notices of designation. (Perkins Decl., ¶ 5.)  
 7 On November 10, 2007, Hudson Marine Management Services (“HMMS”) set up a claims  
 8 center and widely advertised the claims handling process with advertisements in local  
 9 media, the internet, and by posting fliers at relevant marinas and other locations.  
 10 (Hudson Decl., ¶ 4.) Thereafter, HMMS began processing and paying claims. (Id.) The  
 11 normal practice following a spill is for the United States to issue invoices to the  
 12 Responsible Party for its response costs. (Perkins Decl., ¶ 7; Hudson Decl., ¶ 6.) The  
 13 responsible party then reimburses the United States for its costs. (Id.) To date, only five  
 14 claims have been received from the United States. (Hudson Decl., ¶ 6.) Three have been  
 15 settled and two are pending. (Id.) The pending claims are less than 90 days old. (Id.)

16 On November 30, the United States filed this action. It filed the action because it  
 17 claimed it needed security for its claims against the COSCO BUSAN. However, it is not  
 18 necessary to institute a lawsuit to obtain such security, and it is standard practice for  
 19 insurers of vessels such as the COSCO BUSAN to issue security when it is requested,  
 20 without first requiring that a lawsuit be filed. (Federal Rules of Civil Procedure,  
 21 Supplemental Rule E; Declaration of Joseph A. Walsh (“Walsh Decl.”) ¶ 2.) The insurer  
 22 for the Defendants in this case provided the United States security for its claims in the  
 23 amount of \$79,500,000.00. (Walsh Decl., Exhibit A.)

24 Agencies of the United States and the State of California, with jurisdiction over  
 25 the natural resources impacted by the COSCO BUSAN oil spill (“Trustee Agencies”),  
 26 have commenced a cooperative natural resource damages assessment (“NRDA”) process,  
 27 pursuant to the OPA NRDA regulations, set forth at 15 C.F.R. § 990, and State law.  
 28 (Walsh Decl., ¶ 5.) The NRDA regulations require the Trustee Agencies to follow a

1 detailed assessment process, and to seek public comment and input, before settling any  
 2 claims for natural resource damages. (*Id.*) If the Trustee Agencies follow the NRDA  
 3 regulations, they are entitled to a rebuttable presumption under OPA that their  
 4 determinations of damages to natural resources are correct. 33 U.S.C. § 2706(e)(2). The  
 5 NRDA process normally takes several years to complete. (Mauseth Decl., ¶ 6.) Among  
 6 the injuries that the trustees are assessing are injuries to resources under the  
 7 jurisdiction of national parks and national marine sanctuaries. (*Id.*; Walsh Decl.)

8

#### 9 **IV. OIL POLLUTION ACT OF 1990**

10 In 1990 following the EXXON VALDEZ oil spill, Congress overhauled the nation's  
 11 oil pollution laws by enacting OPA. Prior to the enactment of OPA, a vessel owner's  
 12 liability to the United States for oil pollution was governed by the Federal Water  
 13 Pollution Control Act ("FWPCA"), 33 U.S.C. 1321. In hearings leading to the enactment  
 14 of OPA, Congress expressed dissatisfaction with the FWPCA. Its criticisms included the  
 15 fact that the FWPCA only addressed a vessel owner's liability to the United States, and  
 16 that it limited that liability to \$150 per gross ton of the vessel discharging the oil. This  
 17 limit was viewed as too low. See Oil Spill Liability and Compensation: Hearing Before  
the Subcomm. On Water Resources of the Comm. On Public Works and Transp., H. of  
 18 Rep., 101st Cong. 78 (1989) ("[L]iability under the FWPCA is low (\$150/ton) and the  
 19 scope of damages to which liability pertains is limited to the Federal Government's  
 20 cleanup costs and natural resource damages.").

22 Complicating matters, a vessel owner could not assert a credit against the  
 23 \$150/ton limitation amount for funds it expended in cleaning up the spill. United States  
v. Dixie Carriers, 736 F.2d 180, 183 (5th Cir. 1980); Steuart Trans. Co. v. Allied Towing  
Corp., 596 F.2d 609, 619 (4th Cir. 1979). Courts also held that the FWPCA pre-empted  
 24 other causes of action by the United States against a vessel owner to recover removal  
 25 costs incurred to clean up an oil spill. Matter of Oswego Barge Corp., 664 F.2d 327, 344  
 26 (2d Cir. 1981); United States v. M/V BIG SAM, 681 F.2d 432 (5th Cir. 1982). Thus, the  
 27

1 United States could only recover its response costs from a discharging vessel up to the  
 2 FWPCA limits on its liability, and the owner was not entitled to a credit against its  
 3 FWPCA liability for any costs it expended to clean up a spill. The FWPCA thus created  
 4 a financial disincentive for vessel owners to spend money to clean up oil spills. See  
 5 Dixie Carriers, 736 F.2d at 183-185.

6 Congress was also dissatisfied with the settlement of private party claims  
 7 following oil spills. It heard testimony that individuals were often forced to litigate their  
 8 claims in court for years in order to recover their losses. Congress insisted that those  
 9 injured by spills should be swiftly compensated for their losses: "We do not want  
 10 claimants to have to wait years upon years to recover their losses while lawsuits drag on  
 11 in the courts. Instead, if they are unable to reach a settlement with the spiller within 90  
 12 days, they can be compensated from the oil industry financed by the fund, and the fund  
 13 will go after the spiller for reimbursement." 135 Cong. Rec. H7954-H7978 (daily ed.  
 14 Nov. 2, 1989); "The thrust of this legislation is to eliminate, to the extent possible, the  
 15 need for an injured person to seek recourse through the litigation process, which—as we  
 16 all know—can take years." 135 Cong. Rec. H7954-H7978 (daily ed. Nov. 2, 1989).

17 In OPA, Congress remedied these deficiencies. It made clear that a vessel owner  
 18 is strictly liable for all clean up costs and damages resulting from a discharge of oil from  
 19 its vessel. 33 U.S.C. § 2702. It required the President to designate the owner of a  
 20 discharging vessel as the "Responsible Party" and required the Responsible Party to  
 21 publish a notice advising claimants of this designation, and procedures by which they  
 22 may submit claims for reimbursement. 33 U.S.C. § 2714. To avoid delays in the  
 23 payment of claims, it made the Responsible Party liable to pay interest after 30 days  
 24 from the date on which a claim is received, and to establish procedures for interim,  
 25 partial payments to claimants. 33 U.S.C. §§ 2705, 2714(b)(2).

26 To discourage litigation over claims in court, Congress provided that a claimant  
 27 must first present a claim for removal costs or damages to the Responsible Party,  
 28 following the procedures identified in the notice published pursuant to 33 U.S.C. § 2714.

1 See 33 U.S.C. § 2713(a) & (c). If, after 90 days, the Responsible Party does not settle  
 2 with a claimant, the claimant may sue the Responsible Party, or may submit its claim to  
 3 the National Pollution Funds Center (NPFC), established under OPA to administer the  
 4 Oil Spill Liability Trust Fund (“Fund”). Id. OPA provides that the Fund may be used to  
 5 settle such claims. 33 U.S.C. § 2712(a)(4). If the Fund does so, it becomes subrogated to  
 6 the rights of the claimant, and may seek recovery of amounts paid from the Responsible  
 7 Party. 33 U.S.C. §§ 2712(f), 2715.

8 As with most comprehensive statutes, OPA is the “result of innumerable  
 9 compromises between competing interests, reflecting many competing purposes and  
 10 goals.” Boca Ciega Hotel Inc. v. Bouchard Trans. Co., Inc., 51 F.3d 235, 238 (11<sup>th</sup> Cir.  
 11 1995). Thus, while OPA substantially increased the liability of vessel owners, it also  
 12 preserved the right of a vessel owner to limit its liability in some cases. 33 U.S.C.  
 13 § 2704. To eliminate the financial disincentive for a vessel owner to respond to an oil  
 14 spill that had existed under the FWPCA, Congress provided that the right to limit  
 15 liability, or to assert a complete defense to liability, is lost if the Responsible Party fails  
 16 to provide all reasonable cooperation and assistance requested by a responsible official,  
 17 or to comply with a Coast Guard cleanup order. 33 U.S.C. §§ 2703(c) & 2704(c). Even a  
 18 party that is entitled to a complete defense under OPA remains responsible for  
 19 responding to a spill and cleaning it up. Unocal Corp. v. U.S., 222 F.3d 528, 534-36 (9<sup>th</sup>  
 20 Cir. 2000).

21 Thus, even though a Responsible Party may have a complete defense to liability,  
 22 or the right to limit its liability, OPA provides that the Responsible Party must respond  
 23 to the spill and clean it up, if the federal or state governments request it to do so – even  
 24 if the cost of doing so exceeds the limits on the Responsible Party’s liability under OPA.  
 25 Because it is rarely clear in the days after a spill whether the Responsible Party has a  
 26 defense to OPA liability, or the right to limit that liability, the Coast Guard, as a matter  
 27 of practice, always designates the vessel owner and/or operator from which a discharge  
 28 occurs as the Responsible Party, and directs the Responsible Party to respond and clean

1 up the spill. If a Responsible Party believes it is entitled to a complete defense to  
 2 liability, or that it has the right to limit its liability under OPA, OPA allows the  
 3 Responsible Party to submit a claim to the NPFC for reimbursement of amounts it has  
 4 paid that exceed its liability. 33 U.S.C. §§ 2708, 2713(b)(1)(B).

5 These provisions create a powerful incentive for vessel owners and their insurers  
 6 to respond to spills and to clean them up to the satisfaction of state and federal officials.  
 7 Unlike the FWPCA, under OPA a vessel owner who refuses a request that it clean up oil  
 8 spilled from its vessel runs the risk that the NPFC will deny its claim for reimbursement  
 9 on the grounds that it failed to provide cooperation and assistance requested by the  
 10 Coast Guard or the State.

11 While OPA allows a vessel owner to seek reimbursement of removal costs and  
 12 damages it pays in excess of the limits on its liability from the Fund by presenting an  
 13 administrative claim to the NPFC, it does not allow the vessel owner to sue the United  
 14 States for reimbursement of those costs in court. 33 U.S.C. section 2708 is the only  
 15 provision of OPA that permits a Responsible Party to obtain reimbursement of such  
 16 costs, and it only allows the Responsible Party to do so by filing an administrative claim  
 17 with the NPFC under 33 U.S.C. § 2713.

18 The NPFC is an administrative agency within the United States Coast Guard. See  
 19 <http://www.USCG.mil/npfc>. Located in Arlington Virginia, the NPFC maintains a  
 20 claims division which processes claims brought pursuant to 33 U.S.C. § 2713 by federal  
 21 and state agencies, private individuals, and responsible parties. NPFC regulations  
 22 governing OPA claims are published at 33 C.F.R. part 136. The NPFC also publishes  
 23 claims guidelines for claimants, including a "Responsible Party Claim Submission  
 24 Guidance" for ship owners seeking reimbursement from the OSLTF.

25 See [http://www.USCG.mil/npfc/docs/PDFs/urg/URG\\_7\\_05.pdf](http://www.USCG.mil/npfc/docs/PDFs/urg/URG_7_05.pdf). A claimant may seek  
 26 reconsideration from a denial of a claim by the NPFC. 33 C.F.R. § 136.115(d). If the  
 27 agency denies such a request, the denial will be deemed a final agency action, of which a  
 28

1 claimant may seek review under the Administrative Procedures Act (“APA”), 5 U.S.C.  
 2 §§ 701, *et seq.* .

3

4 **V. THE UNITED STATES CLAIMS FOR REMOVAL COSTS AND DAMAGES  
 MUST BE DISMISSED UNTIL THE UNITED STATES COMPLIES WITH  
 OPA’S CLAIMS PRESENTATION REQUIREMENTS.**

5

6 **A. The Presentation Requirement of the Oil Pollution Act of 1990  
 Requires Dismissal of All Claims For Removal Costs or Damages**

7

8 OPA requires that “all claims for removal costs or damages shall be presented  
 9 *first* to the Responsible Party.” 33 U.S.C. § 2713(a)(emphasis added). A claim must be  
 10 specific. It must “inform the responsible party with some precision of the nature and  
 11 extent of the damages alleged and the amount of monetary damages claimed.  
 12 Otherwise, the responsible party will be unable to make an informed offer of its own,  
 13 unable to engage in meaningful settlement negotiations, and thus unable to settle the  
 14 matter by agreeing to a final amount.” Johnson v. Colonial Pipeline Co., 830 F. Supp.  
 15 309, 311 (E.D. Va 1993). The NPFC regulations set forth the specificity requirements for  
 16 a claim for response costs and damages. Id. A party may not sue the responsible party  
 17 in court, unless the responsible party denies the claim or fails to respond within 90 days.  
 18 33 U.S.C. § 2713(c). As explained in Johnson, Congress hoped that this claims process  
 19 would avoid the need for litigation:

20

21 The purpose of the claim presentation procedure is to promote  
 22 settlement and avoid litigation. Congress believed that  
 23 lawsuits against parties are appropriate only ‘where attempts  
 24 to reach a settlement with the Responsible Party . . . were  
 unsuccessful.’ H.R. Rep. No. 242, 101<sup>st</sup> Cong., 1<sup>st</sup> Sess., pt. 2, at  
 66 (1989). The hope was to avoid costly and cumbersome  
 litigation.

25 Johnson, 830 F.Supp at 311; see also, Boca Ciega, 51 F.3d at 238-234 (“OPA reflects  
 26 Congress’ desire to encourage settlement and avoid litigation.”) The presentation  
 27 requirement is jurisdictional and mandates dismissal when it is not complied with. Boca  
 28 Ciega, 51 F.3d 235, 238-240 (11<sup>th</sup> Cir. 1995); Johnson v. Colonial Pipeline Co., 830

1 F.Supp. at 309-10; Marathon Pipeline Co. v. LaRoche Industries, 944 F.Supp 476, 477  
 2 (E.D. La 1996).

3 In this case, the United States has presented five small claims to Defendants.  
 4 (Hudson Decl., ¶ 6.) Three have been settled and two are pending. (Id.) None are older  
 5 than 90 days. (Id.) The United States filed this action 23 days after the Cosco Busan  
 6 incident in blatant disregard of OPA's mandatory claims presentation requirements.  
 7 Thus its claims for removal costs and damages resulting from the COSCO BUSAN  
 8 incident must be dismissed.

9 **B. The Presentation Requirement Applies to Claims for Removal  
 10 Costs and Damages Under the NMSA and the PSRPA**

11 OPA expressly requires that “all claims for removal costs and damages shall first  
 12 be presented to the responsible party.” 33 U.S.C. § 2713(a) (emphasis added). A  
 13 claimant may only sue the responsible party if the responsible party denies the claim or  
 14 fails to respond to it within 90 days. 33 U.S.C. § 2713(c).

15 OPA defines a “claim” as “a request, made in writing for a sum certain, for  
 16 compensation for damages or removal costs resulting from an incident.” 33 U.S.C. §  
 17 2701(3). “Incident” means “any occurrence . . . resulting in the discharge ...of oil.” 33  
 18 U.S.C. § 2701(14). The United States has determined that the COSCO BUSAN spill was  
 19 an incident under OPA, as reflected in its Notice of Designation. (Perkins Decl., Exhibit  
 20 “A.”) Thus OPA’s claims presentation requirement clearly applies to “all claims” for  
 21 “removal costs” and “damages” that result from the COSCO BUSAN incident.

22 “Removal costs” are broadly defined in OPA to include the cost of:

23 containment and removal of oil ...from water and shorelines,  
 24 or the taking of other actions as may be necessary to minimize  
 25 or mitigate damage to public health or welfare, including, but  
 26 not limited to, fish, shellfish, wildlife, and public and private  
 27 property, shorelines, and beaches.

28 33 U.S.C. § 2701(30) & (31). OPA makes Defendants strictly liable for “all” of the United  
 29 States removal costs resulting from the Cosco Busan incident. 33 U.S.C. § 2702(a) &

1 (b)(1). "Damages" under OPA include damages for injury to, destruction of, loss of, or  
 2 loss of use of, natural resources, including the reasonable costs of assessing the damage,  
 3 and damages for injury to real or personal property, economic losses resulting from  
 4 destruction of, real or personal property, lost revenues such as taxes, and increased costs  
 5 of providing public services during or after removal activities. 33 U.S.C. § 2702(b)(2).

6 With these terms defined, there are no conceivable claims for removal costs or  
 7 damages resulting from the Cosco Busan incident that the United States can recover  
 8 under the NMSA or the PSRPA, that are not also recoverable under OPA. The PSRPA  
 9 defines "damages" to include the cost of replacing or restoring damaged resources, the  
 10 loss of use of those resources, and the costs of assessing such damages. 16 U.S.C.  
 11 § 19jj(b). It defines Response Costs to include the costs of actions taken by the United  
 12 States to prevent, minimize, or abate the destruction or loss of a park resource. 16  
 13 U.S.C. § 19jj(c). The NMSA also allows the United States to recover civil damages for  
 14 the destruction of, or loss of use of, marine sanctuary resources. 16 U.S.C. § 1443. These  
 15 definitions do not allow the United States to recover, under the NMSA or the PSRPA,  
 16 any response costs or damages, as a result of the oiling of park or marine sanctuary  
 17 resources, which are not otherwise recoverable under OPA.

18 Since all of the claims asserted by the United States are for damages or response  
 19 costs resulting from the Cosco Busan incident, they are subject to OPA's claims  
 20 presentation requirement. As set out above, Congress intended that OPA would  
 21 minimize litigation following an oil spill by creating a mandatory non-judicial claims  
 22 presentation requirement. Congress' use of the words "all claims" in 33 U.S.C. § 2713 (a)  
 23 and its broad definitions of "claim", "removal costs," and "damages" reflect its clear  
 24 intent to require that claims such as those pursued by the United States in this lawsuit  
 25 be presented to the responsible party for settlement before a lawsuit is filed. Nothing in  
 26 OPA suggests that Congress intended to permit claimants, including the government, to  
 27 avoid the mandatory claims process by suing for OPA removal costs or damages under  
 28 non-OPA causes of action.

1           OPA's savings provision does not affect or modify the claims presentation  
 2 requirement. The provision simply states that OPA should not be construed to affect the  
 3 authority of the United States or a State to impose *additional* liability or *additional*  
 4 requirements relating to a discharge of oil. 33 U.S.C. § 2718(c). This provision preserves  
 5 the rights of States and Congress to enact laws in addition to OPA that impose  
 6 additional liabilities on polluters. After complying with OPA's claims presentation  
 7 requirements, nothing prevents the United States from suing Defendants under non-  
 8 OPA causes of action. Thus, OPA's savings provision does not allow a claimant to  
 9 disregard the mandatory claims presentation requirement under OPA for removal costs  
 10 or damages that result from an incident. Boca Ciega, 51 F.3d at 239.

11           **C. In the Alternative, the Court Should Stay the Case with Respect to  
 12 the Non-OPA Causes of Action**

13           If the Court determines that OPA's presentation requirements do not apply to the  
 14 non-OPA causes of action, then Defendants request that the Court stay any proceedings  
 15 with respect to these claims. The Court has the inherent power to stay proceedings  
 16 before it in the interest of judicial economy. Landis v. North Am. Co., 299 U.S. 248, 254  
 17 (1936) (Power to stay is "incidental to the power inherent in every court to control the  
 18 disposition of the causes of action on its docket.") Staying proceedings is appropriate  
 19 when the interests of justice require it, the adjudication of a claim would be a waste of  
 20 judicial resources, and the plaintiff will not be substantially harmed by the stay. See  
 21 Hess v. Gray, 85 F.R.D. 15, 27 (N.D. Ill 1979).

22           These principles favor granting a stay of the United States' causes of action  
 23 brought against Defendants under the NMSA and the PSRPA. The damages being  
 24 sought by the United States under the NMSA and the PSRPA are the same damages  
 25 that the United States will seek to recover under OPA. Only a very small part of the  
 26 United States response costs will be for response activities in marine sanctuaries or  
 27 national parks. The damages for injury to natural resource within sanctuaries and  
 28 parks are being pursued by the NRDA trustees, under the OPA NRDA regulations.

1 Defendants have advanced the U.S. Dept. of the Interior \$500,000 to date to conduct this  
 2 assessment. (Walsh Decl., ¶¶ 5-6.)

3 Because OPA prohibits a double recovery for injuries to natural resources, 33  
 4 U.S.C. 2706(d)(3), the United States cannot pursue a claim for injury for these resources  
 5 under both OPA and non-OPA causes of action. Conversely, permitting the United  
 6 States to pursue its claims under the NMSA and the PSRPA will prejudice the  
 7 Defendants. Such a result will force the Defendants to expend time and resources  
 8 litigating their liability under three statutes when the pertinent issues can be resolved  
 9 under a single statute- OPA '90. Finally, a stay will save judicial resources. There is no  
 10 reason for the Court to judicially oversee claims that would otherwise resolve through  
 11 the OPA claims adjudication process.

12

13 **VI. THE UNITED STATES' FORFEITURE ACTION UNDER THE NMSA**  
 14 **MUST BE DISMISSED BECAUSE THE COMPLAINT DOES NOT ALLEGE**  
 15 **THE DEFENDANTS HAVE TAKEN OR RETAINED SANCTUARY**  
 16 **RESOURCES.**

17 Courts must strictly construe forfeiture statutes against the government.  
 18 United States v. One 1992 Ford Mustang, 73 F. Supp. 2d 1131, 1131 (C.D. Cal.  
 19 1999) ("Forfeiture is a harsh and oppressive procedure which is not favored by the  
 20 courts."); see also United States v. \$191,910.00 in U.S. Currency, 16 F. 3d 1051, 1069  
 21 (9th Cir. 1994) (overruled on other grounds). Therefore, this Court must strictly  
 22 construe the NMSA's forfeiture section. In construing the NMSA's forfeiture section, the  
 23 starting point is the statute's language. United States v. One Parcel of Land In The  
 24 Name of Mikell, 33 F. 3d 11, 13 (5th Cir. 1994). If a statute's language makes Congress'  
 25 intent clear, "that is the end of the matter." Id.

26 The NMSA provides:

27 Any vessel (including the vessel's equipment, stores, and  
 28 cargo) and other item used, *and any sanctuary resource taken*  
*or retained*, in any manner, in connection with or as a result of  
 any violation of this chapter or of any regulation or permit  
 issued under this chapter shall be subject to forfeiture to the

United States pursuant to a civil proceeding under this subsection...

16 U.S.C. § 1437(d)(1)(emphasis added). The foregoing emphasized language demonstrates Congress' intent to permit vessel forfeiture under the NMSA only when a vessel is used to take or retain a sanctuary resource.<sup>1</sup> This Court must strictly construe the statute to this effect. If Congress intended the NMSA to permit vessel forfeiture for a violation of the NMSA that did *not* involve the taking or retention of a sanctuary resource, it would have used "or" instead of the above-emphasized "and." However, Congress did not do so. This Court must presume that "Congress chose its words with as much care as [the Court] brings to bear on the task of statutory interpretation." United States v. BCCI Holdings (Luxembourg), S.A., 833 F. Supp. 17, 21 (D.D.C. 1993)(citation omitted). Consequently, the United States must allege sanctuary resources were taken or retained in connection with or as a result of the COSCO BUSAN incident. The United States fails to allege this essential element. Therefore, the Defendants respectfully request that this Court dismiss the United States' NMSA forfeiture action.

Additional provisions of the NMSA’s forfeiture section demonstrate that Congress contemplated vessel forfeiture only upon the taking or retention of a sanctuary resource. Critically, the NMSA provides that for vessel forfeiture purposes, “there is a rebuttable presumption that *all sanctuary resources found on board* a vessel that is used...in connection with a violation of this chapter...were taken or retained in violation of this chapter...” 16 U.S.C. § 1437(d)(4)(emphasis added); see also 16 U.S.C. § 1437(d)(3)(disposal of sanctuary resources seized in connection with a vessel forfeiture). Taken together with 16 U.S.C. § 1437(d)(1), these additional provisions establish an enforcement regime for addressing instances where sanctuary resources are taken or

<sup>1</sup> "Sanctuary resource" means any living or nonliving resource of a national marine sanctuary that contributes to the conservation, recreational, ecological, historical, research, educational, or aesthetic value of the sanctuary." 16 U.S.C. § 1432(8).

1 retained from designated marine sanctuaries. The United States complaint does not  
 2 implicate this regime because it does not allege such conduct resulted from the COSCO  
 3 BUSAN incident or that the COSCO BUSAN was used to perpetrate such conduct.  
 4 Therefore, this Court should dismiss the United States' forfeiture action.

5 Finally, although the NMSA does not define what conduct results in the taking or  
 6 retention of a sanctuary resource, the NMSA's language demonstrates that Congress  
 7 intended such conduct to be something more than conduct resulting only in the  
 8 destruction, loss, or injury to sanctuary resources. While such conduct alone supports  
 9 other forms of relief, e.g., civil penalties (see 16 U.S.C. §§ 1437(c)(1) & 1436(1)), *in rem*  
 10 liability (16 U.S.C. § 1443(2)) and injunctive relief (16 U.S.C. § 1437(i)), the NMSA's  
 11 forfeiture section requires such conduct to occur *in connection with* or *result* in a  
 12 sanctuary resource being taken or retained. See 16 U.S.C. §§ 1437(d)(1) & 1436(1). In  
 13 other words, Congress intended conduct causing damage to, the loss of, or injury to a  
 14 sanctuary resource to permit vessel forfeiture only if such conduct occurred in connection  
 15 with or resulted in a *separate and distinct* event constituting the taking or retention of a  
 16 sanctuary resource. Accordingly, the United States' allegation that "vessels used to  
 17 destroy and/or cause the loss and/or injure National Marine Sanctuaries...are subject to  
 18 forfeiture..." is insufficient to support its forfeiture action. See Complaint ¶ 34. The  
 19 Defendants respectfully request that this Court dismiss the United States' NMSA  
 20 forfeiture action.

21

**VII. THERE IS NO ACTUAL CONTROVERSY UNDER THE DECLARATORY  
 22 JUDGMENT ACT**

23 Plaintiff's fourth cause of action requests a declaratory judgment that Defendants  
 24 are liable for removal costs and damages resulting from the oil spill. However, since  
 25 Defendants admit they are strictly liable to pay OPA response costs and damages, there  
 26 is no case or controversy for the Court to address. Once again, Defendants reiterate that  
 27 they accepted the notice of designation months ago as the Responsible Party and have  
 28

1 been funding the response and paying legitimate claims for damages resulting from the  
 2 oil spill.

3 The Declaratory Judgment Act authorizes federal courts to declare the rights and  
 4 other legal relations of parties when an actual controversy exists. 28 U.S.C. § 2201. The  
 5 Act provides that “in a case of actual controversy within its jurisdiction . . . any court of  
 6 the United States . . . may declare the rights and other legal relations of any interested  
 7 party seeking such declaration, whether or not further relief is or could be sought.”  
 8 28 U.S.C. § 2201(a). The “actual controversy” required by the Declaratory Judgment  
 9 Act is the same as the “case or controversy” requirement of Article III. Societe de  
 10 Conditionnement en Aluminum v. Hunter Eng'g Co., 655 F.2d 938, 942 (9<sup>th</sup> Cir. 1981)  
 11 (citing Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 239-240 (1937)). “Issuing a  
 12 judgment in a case without an actual controversy is an advisory opinion, which is  
 13 prohibited by Article III of the United States Constitution.” Duhn Oil Tool, Inc. v.  
 14 Cooper Cameron Corp., 2007 WL 3335008, at \*3 (E.D. Cal. Nov. 9, 2007). “[T]he facts  
 15 alleged, under all the circumstances, [must] show that there is a substantial controversy,  
 16 between parties having adverse legal interests, of sufficient immediacy and reality to  
 17 warrant the issuance of a declaratory judgment.” Maryland Casualty Co. v. Pacific Coal  
 18 & Oil Co., 312 U.S. 270, 273 (1941). “If a case is not ripe for review, then there is no case  
 19 or controversy.” Principal Life Ins., Co. v. Robinson, 394 F.3d 665, 669 (9<sup>th</sup> Cir. 2005).  
 20 In this case, there is no actual case or controversy between the parties. Consequently,  
 21 the Court cannot enter a declaratory judgment.

22 OPA provides that in an action to recover removal costs under OPA, “the Court  
 23 shall enter a declaratory judgment on liability for removal costs or damages that will be  
 24 binding on any subsequent action or actions to recover further removal costs or  
 25 damages.” 33 U.S.C. § 2717(f)(2). However, this provision is predicated upon an action  
 26 being filed to recover OPA removal costs, which cannot occur until the claims  
 27 presentation requirements of 33 U.S.C. § 2713 have been followed. As set out above, the  
 28

1 United States has not complied with these requirements. Therefore, it cannot seek a  
2 declaratory judgment under 33 U.S.C. § 2712(f)(2).

3 **VIII. THIS COURT LACKS JURISDICTION TO DECIDE WHETHER THE**  
4 **DEFENDANTS ARE ENTITLED TO LIMIT THEIR OPA LIABILITY**

5 Although not expressly set out in its Complaint, the Department of Justice has  
6 advised that it wants to litigate Defendants' entitlement to limit their OPA liability  
7 under 33 U.S.C. § 2704. If the Court has subject matter jurisdiction over this issue,  
8 then a decree by the Court that the Defendants are entitled to limit their OPA liability  
9 would bind the United States, and require the NPFC to reimburse Defendants any funds  
10 expended in response to the Cosco Busan incident above the limitation amount. This  
11 could result in a liability against the Oil Spill Liability Trust Fund in the amount of tens  
12 of millions of dollars.

13 This Court has no jurisdiction over the limitation issue. The United States has  
14 not waived its sovereign immunity with respect to such claims. Moreover, the doctrine  
15 of exhaustion of administrative remedies requires that the limitation issue first be  
16 presented for determination by the NPFC. If a shipowner is aggrieved by a decision of  
17 the NPFC, it may seek review of that decision under the Administrative Procedures Act.  
18 5 U.S.C. §§ 701, *et seq.* Finally, the doctrine of primary jurisdiction weighs in favor of  
19 the Court deferring to the expertise of the NPFC with respect to the limitation issue.

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1           **A. The United States Has Not Waived Sovereign Immunity Under OPA  
2           '90**

3           The United States may not be sued unless federal legislation specifically  
4           authorizes the suit. Hercules, Inc. v. United States, 516 U.S. 417, 422 (1996);  
5           Blackburn v. United States, 100 F.3d 1426, 1429 (9th Cir. 1996). Only Congress can  
6           consent to suits against the United States, the Executive is powerless to waive the  
7           federal government's sovereign immunity. E. CHEMERINSKY, FEDERAL JURISDICTION,  
8           §9.2.1 (3d ed.1999). "A waiver of sovereign immunity 'cannot be implied but must be  
9           unequivocally expressed.'" United States v. Mitchell, 445 U.S. 535, 537–38 (1980)  
10           (citations omitted). "Any waiver of sovereign immunity is to be construed narrowly, with  
11           ambiguities resolved in favor of the government. The natural consequence of the  
12           sovereign immunity principle is that the absence of consent by the United States is a  
13           fundamental defect that deprives the district court of subject matter jurisdiction."  
14 CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3654 (3d ed.  
15 1998) (citing cases).

16           OPA '90 does not include a waiver of the United States' sovereign immunity. See  
17 Int'l Marine Carriers v. Oil Spill Liability Trust Fund, 903 F. Supp. 1097, at 1102 (S.D.  
18 Tex. 1994) (finding even if Responsible Party could assert jurisdiction under 33 U.S.C.  
19 § 2717(b), sovereign immunity precluded the court's review of Responsible Party's claims  
20 for limitation of liability). "Nothing in OPA [33 U.S.C. §§ 2712, 2713, or 2715] can be  
21 construed as a waiver of sovereign immunity . . . . These sections do not create, nor can  
22 this court imply, a right to sue the [OSLTF] directly." Id. at 1102.

23           Consistent with the Int'l Marine Carriers decision, the Department of Justice has  
24 maintained in other cases that a district court lacks jurisdiction to decide whether a  
25 shipowner is entitled to limit its liability under OPA. For example, in Unocal v. United  
26 States, a buried Unocal crude oil pipeline was breached during construction of a rail line,  
27 resulting in an oil discharge. After paying to clean up the costs of the pipeline, Unocal  
28 sought reimbursement of its costs from the NPFC. When the NPFC denied the claim,

1 Unocal sued the United States in the United States District Court for the District of  
 2 Central California. The United States moved to dismiss Unocal's claims, on the grounds  
 3 that the Court lacked subject matter jurisdiction to order the NPFC to reimburse  
 4 Unocal. The Court ruled for the United States. Copies of the United States motion  
 5 papers and the Court's order in the Unocal case are attached as Exhibits C-D to the  
 6 Walsh Declaration filed concurrently with the Motion.

7 OPA does not say that a responsible party can sue in federal court to obtain a  
 8 decree establishing its right to seek reimbursement from the OSLTF. Instead, it says  
 9 that if a responsible party pays more than its OPA limitation amount, it can present a  
 10 claim for reimbursement to the NPFC. 33 U.S.C. §§ 2708 & 2713(b). If the NPFC denies  
 11 the claim, the responsible party can seek review under the APA. See International  
 12 Marine Carriers, 903 F.Supp. at 1102; Gatlin Oil Co. v. United States, 169 F.3d 207 (4th  
 13 Cir. 1999); Water Quality Insurance Syndicate v. United States, 522 F.Supp.2d 220  
 14 (D.D.C. 2007); Apex Oil Co. v. United States, 208 F.Supp.2d 642, 2002 A.M.C. 493 (E.D.  
 15 La 2002); Smith Property Holdings, 4411 Connecticut L.L.C. v. United States, 311  
 16 F.Supp.2d 69 (D.D.C 2004).

17 The attempt by the United States to raise the limitation issue in this suit is  
 18 inconsistent with the plain language of OPA, with the position taken by the United  
 19 States in previous cases, and with the process followed by responsible parties and the  
 20 NPFC in the cases cited in the preceding paragraph. Defendants are aware of no legal  
 21 authority that suggests the Court has jurisdiction over the limitation issue. An order  
 22 declaring that the Defendants are entitled to limit their liability would be tantamount to  
 23 an order directing the NPFC to reimburse the Defendants for amounts expended above  
 24 the limitation amount. Congress, in OPA, directed that such reimbursement claims be  
 25 presented to the NPFC, which administers the OSLTF. Consequently, this Court lacks  
 26 subject matter jurisdiction over the OPA limitation issues, and should dismiss the  
 27 Complaint to the extent it raises the limitation issue.

1                   **B. Defendants Have Not Exhausted Their Administrative Remedies**  
 2                   **Before The NPFC**

3                   This Court should not address the limitation issue because the Defendants have  
 4                   not yet exhausted their administrative remedies. OPA '90 and the NPFC's regulations  
 5                   require Defendants to first present their claims for limitation of liability under OPA '90  
 6                   to the NPFC.

7                   The doctrine of exhaustion of administrative remedies provides "that no one is  
 8                   entitled to judicial relief for a supposed or threatened injury until the prescribed  
 9                   administrative remedy has been exhausted." Moncrief v. United States, 43 Fed. Cl. 276,  
 10                  284 (1999) (granting defendant's motion to dismiss because plaintiff failed to exhaust  
 11                  administrative remedy)(citations omitted). "Exhaustion is required to serve the  
 12                  purposes of protecting administrative agency authority and promoting judicial  
 13                  efficiency." Id. (citations omitted). The Supreme Court of the United States has stated:

14                  [t]he agency, like a trial court, is created for the purpose of  
 15                  applying a statute in the first instance. Accordingly, it is  
 16                  normally desirable to let the agency develop the necessary  
 17                  factual background upon which decisions should be based. And  
 18                  since agency decisions are frequently of a discretionary nature  
 19                  or frequently require expertise, the agency should be given the  
 20                  first chance to exercise that discretion or to apply that  
 21                  expertise.

22                  Moncrief, 43 Fed. Cl. at 284 (citing McKart v. United States, 395 U.S. 185, 193 (1969)).  
 23                  "An agency's effectiveness may also be weakened if people are encouraged to ignore its  
 24                  procedures by the allowance of 'frequent and deliberate flouting of the administrative  
 25                  process.'" Moncrief, 43 Fed. Cl. at 284 (citing McKart, 395 U.S. at 195). While failure to  
 26                  exhaust administrative remedies does not deprive a federal court of jurisdiction when an  
 27                  exhaustion statute is "merely a codification of the exhaustion requirement . . .," federal  
 28                  courts should still require compliance with an exhaustion statute unless the suit alleges  
 29                  a constitutional claim. McBride Cotton and Cattle Corp. v. Veneman, 290 F.3d 973, 978-  
 30                  980 (9th Cir. 2002).

1       The only avenue available to a Responsible Party seeking reimbursement from the  
 2 OSLTF for costs in excess of its liability limitation under OPA '90 is to present a claim to  
 3 the NPFC. 33 U.S.C. § 2708. OPA conveys no right for either the Responsible Party or  
 4 the United States to raise the limitation issue in federal court in the first instance.  
 5 Instead, OPA '90 provides that a Responsible Party who is entitled to a limitation of  
 6 liability under 33 U.S.C. § 2404, "may assert a claim for removal costs and damages  
 7 under [33 U.S.C. § 2713]." See 33 U.S.C. §§ 2708(2) & 2713(b)(1)(B). At 33 C.F.R.  
 8 §§ 136.1 through 136.313, the NPFC has promulgated regulations governing the  
 9 "[p]resentation, filing, processing, settlement, *and adjudication* of claims authorized to  
 10 be presented to the [OSLTF]." 33 C.F.R. § 136.1(a)(1) (emphasis added). The NPFC  
 11 routinely determines claims by responsible parties for reimbursement of amounts  
 12 expended in excess of their OPA limits on liability. See e.g. In re Kuroshima Shipping  
 13 Act of God and Limitation of Liability Analysis, 2003 AMC 1681 (Nat'l Pollution Funds  
 14 Center 2003). If a Responsible Party's claim for reimbursement is denied by the NPFC,  
 15 the Responsible Party can seek judicial review of the NPFC's decision under the  
 16 Administrative Procedure Act. See e.g., Water Quality Insurance Syndicate v. United  
 17 States, 522 F.Supp.2d 220 (D.D.C. 2007).

18       Under this statutory and regulatory scheme, it is clear that Defendants must first  
 19 present their claims for reimbursement to the NPFC, and exhaust their remedies with  
 20 that agency, before seeking judicial review. The NPFC, as a branch of the United  
 21 States Coast Guard, has the necessary expertise to adjudicate responsible parties' claims  
 22 for reimbursement from the OSLTF for costs in excess of their liability limitation under  
 23 OPA. With regard to such claims, there are several issues that the NPFC is better  
 24 suited to resolve than a district court. For example, in order for a Responsible Party to  
 25 establish a right to limit its liability under OPA, the NPFC must determine whether the  
 26 incident causing the discharge was the result of the violation of Coast Guard  
 27 regulations, gross negligence, or willful misconduct. See 33 § U.S.C. 2704(c). It must  
 28 also determine whether the actions taken by the Responsible Party were necessary to

1 prevent, minimize, or mitigate the effects of an oil spill, that removal costs were incurred  
 2 as a result of these actions, that the Responsible Party provided reasonable cooperation  
 3 and assistance in a removal, and that the actions taken were consistent with the  
 4 National Contingency Plan or directed by the Federal On-Scene Coordinator. See 33  
 5 C.F.R. § 136.203.

6 Consequently, the NPFC should be given the first opportunity to hear any and all  
 7 of Defendants claims for reimbursement from the OSLTF for costs in excess of their  
 8 liability limitation under OPA '90.

9 **C. Alternatively, This Court Should Abstain From Addressing The  
 10 Limitation Issue Under The Primary Jurisdiction Doctrine**

11 Under the doctrine of primary jurisdiction, "courts may, under appropriate  
 12 circumstances, determine that the initial decision making responsibility should be  
 13 performed by the relevant agency rather than the courts." Syntek Semiconductor Co.  
 14 Ltd. v. Microchip Tech, Inc., 307 F.3d 775, 780–81 (9th Cir. 2002). Although primary  
 15 jurisdiction does not implicate the federal courts' subject matter jurisdiction, it "is  
 16 properly invoked when a claim, even though cognizable in federal court, requires  
 17 resolution of an issue of first impression or of a complicated issue committed to a  
 18 regulatory agency by Congress." Id. at 780–81 (citations omitted). Primary jurisdiction  
 19 "is committed to sound discretion of the court when 'protection of the integrity of a  
 20 regulatory scheme dictates preliminary resort to the agency which administers the  
 21 scheme.'" Id. at 781 (citations omitted). A court's invocation of the primary jurisdiction  
 22 doctrine does not deprive it of jurisdiction- rather it imposes a stay on the litigation or  
 23 dismisses the litigation without prejudice. See Id. at 782.

24 A court may properly invoke primary jurisdiction in suits initiated by the United  
 25 States. In Far East Conference v. United States, the United States filed suit in a district  
 26 court to enjoin what it alleged to be defendant's violations of the SHERMAN ANTITRUST  
 27 ACT. 342 U.S. 570, 571 (1952). The defendant moved to dismiss the United States' suit  
 28 on the ground that the "nature of the issues require that resort must first be had to the

1 Federal Maritime Board before a District Court could adjudicate the Government's  
 2 complaint." Id. at 572. In concluding the Federal Maritime Board should hear the  
 3 issues before the District Court, the Court observed:

4       . . . [I]n cases raising issues of fact not within the conventional  
 5 experience of judges or cases requiring the exercise of  
 6 administrative discretion, agencies created by Congress for  
 7 regulating the subject matter should not be passed over. . . .  
 8 Uniformity and consistency in the regulation of business  
 9 entrusted to a particular agency are secured, and the limited  
 10 functions of review by the judiciary are more rationally  
 11 exercised, by preliminary resort for ascertaining and  
 interpreting the circumstances underlying legal issues to  
 agencies that are better equipped than courts by  
 specialization, by insight gained through experience, and by  
 more flexible procedure.

12 Id. at 574-75.

13       Factors traditionally considered by courts in determining whether to invoke  
 14 primary jurisdiction include: "(1) the need to resolve an issue that (2) has been placed by  
 15 Congress within the jurisdiction of an administrative body having regulatory authority  
 16 (3) pursuant to a statute that subjects an industry or activity to a comprehensive  
 17 regulatory authority that (4) requires expertise or uniformity in administration."  
 18 Syntek, 307 F.3d at 781 (citations omitted).

19       Pursuant to the doctrine of primary jurisdiction, this Court should dismiss  
 20 without prejudice or stay the United States' action against Defendants. First, resolving  
 21 limitations of liability under OPA and administering claims for reimbursement from the  
 22 OSLTF are complicated issues which have been placed within the NPFC's jurisdiction by  
 23 Congress. Second, the NPFC has jurisdiction over these issues pursuant to OPA and its  
 24 own regulations- a statutory and regulatory scheme that subjects the activity of oil spill  
 25 response to comprehensive regulation. See 33 C.F.R. §§ 2701-2762; see also 33 C.F.R.  
 26 §§ 136.1-136.313. Finally, as noted above, these issues require the NPFC's expertise  
 27 and uniformity in administration. See 33 C.F.R. § 136(a)(1). Therefore, even if the  
 28 Court determines that the United States' action against Defendants is within its

1 jurisdiction, it should still dismiss without prejudice or stay the action since all of the  
2 factors supporting this Court's invoking the primary jurisdiction of the NPFC are  
3 present.

4

5 **IX. CONCLUSION**

6 For the foregoing reasons, Defendants respectfully request that the Court dismiss  
7 the United States OPA and non-OPA claims, or stay them until an actual controversy  
8 within the Court's jurisdiction arises.

9

10 DATED: March 21, 2008

/s/ John Giffin

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